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No. 93-114

In The

Supreme Court of the United States

October Term, 1993

LEGACY, LTD.,

Petitioner,

vs.

CHANNEL HOME CENTERS, INC., CHANNEL HOME CENTERS REALTY CORPORATION and CHANNEL ACQUISITION COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether § 365(d)(4) of the Bankruptcy Code permits the Bankruptcy Court to grant a debtor-lessee multiple extensions of time in which to assume or reject leases of nonresidential real property where the first extension is granted within the initial sixty day period after the entry of the order for relief and the additional extensions are granted prior to the expiration of the period as previously extended, and there is "cause" for granting each extension.

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PRELIMINARY STATEMENT

Petitioner, Legacy, Ltd. ("Legacy"), seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit ("Third Circuit") from a decision of the Third Circuit entered on March 30, 1993, which affirmed the decisions of the United States District Court for the District of New Jersey ("District Court") and the United States Bankruptcy Court for the District of New Jersey ("Bankruptcy Court") approving the assumption by Respondent,

Channel Home Centers Realty Corporation ("Channel Realty"), of an unexpired lease between Channel Realty and Legacy.

The Third Circuit held that the Bankruptcy Court properly granted Channel Realty multiple extensions of time to assume or reject its leases of nonresidential real property because the first extension was granted within the initial sixty day period after the entry of the order for relief, and the additional extensions were granted prior to the expiration of the extended period. The Third Circuit also held that there was cause for each extension.

The Supreme Court of the United States should not grant Legacy's Writ of Certiorari. Legacy, in an attempt to create a special and important reason for granting its writ of certiorari, where none exists, erroneously claims that the decision of the Third Circuit is in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") and the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") on the same matter. However, an objective and thorough examination of the decisions of the Third Circuit, the Fifth Circuit, and the Ninth Circuit shows that the result reached by all three courts of appeals is the same. All three courts of appeals hold that § 365(d)(4) of the Bankruptcy Code authorizes bankruptcy courts to grant debtor-lessees multiple extensions of time in which to assume or reject leases of nonresidential real property so long as the first extension is granted within the initial sixty day period after the entry of the order for relief and the additional extensions are granted prior to the expiration of the extended period, and there is cause for granting each extension.

Since Legacy has failed to establish that the decision of the Third Circuit is in conflict with the decisions of the Fifth Circuit and the Ninth Circuit, Legacy's Writ of Certiorari must not be granted. Furthermore, Legacy's Writ of Certiorari should be denied, because the Third Circuit, contrary to Legacy's contention,

did not ignore the standards of statutory interpretation prescribed by decisions of the Supreme Court of the United States.

Legacy's basic argument is that the decision of the Third Circuit conflicts with the decisions of the Fifth Circuit and Ninth Circuit as to (i) the time within which the first extension must be sought and (ii) the time within which cause for the extension must first arise. All three courts of appeals agree that the first extension must be sought within the initial sixty day period following the entry of the order for relief. None of the courts of appeals hold that the only cause which will support an extension granted after the expiration of the initial sixty day period is a cause which first arises within the initial sixty day period and is found to continue.

Legacy, relying upon its mistaken belief that the Fifth Circuit and Ninth Circuit require the cause which supports the first extension to be the same cause which supports the second extension, contends that there is a conflict because the Third Circuit upheld the additional extension when the cause relied upon to support the first extension was different than the cause relied upon to support the second extension. Legacy's contention is incredulous. The District Court, sitting as an appellate court, found that the cause asserted for both the first and second extension was the same. The Third Circuit concurred. The Supreme Court of the United States accepts concurrent findings of lower courts on questions of fact. It would be improvident for the Supreme Court of the United States to grant Legacy's Writ of Certiorari because this argument attempts to place before this Court an issue that is merely factual.

STATEMENT OF THE CASE

Respondent, Channel Home Centers, Inc. ("Channel"), is a Delaware corporation engaged in the retail sale of home improvement products. Channel Realty is a wholly owned subsidiary of Channel, and is engaged in the leasing, subleasing, purchasing and sale of real estate interests associated with Channel's retail outlets. Channel Acquisition Company ("Acquisition") owns 100% of the stock of Channel.

On January 14, 1991 (the "Filing Date"), Channel and Channel Realty filed petitions for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code"), in the Bankruptcy Court. On April 8, 1991, Acquisition filed its petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court. Channel, Channel Realty and Acquisition ("Respondents") continued to manage and operate their respective businesses and properties as debtors-in-possession. On March 18, 1992, the Bankruptcy Court entered the order confirming the Respondents' joint plan of reorganization.

As of the Filing Date, Channel leased and/or owned in excess of 86 retail stores, a corporate headquarters and four (4) warehouse facilities, and employed approximately 4,000 people. Further, Channel and Channel Realty were either tenant or landlord to over 200 leases and/or subleases of nonresidential real property at 91 separate locations in 19 different states (collectively, the "Leases").

Legacy is the successor-in-interest to Channel Realty's landlord under a March 16, 1966 lease agreement, as amended (the "Brandywine Lease"), of certain real property located in Brandywine, Delaware (the "Brandywine Property"). The original term of the Brandywine Lease expires on April 30, 2010 and contains an option to extend the lease term for an additional twenty

(20) years. At the time Channel Realty entered into the Brandywine Lease, the Brandywine Property was a vacant lot. The Respondents constructed a 61,565 square foot shopping center on the Brandywine Property at a cost of approximately $2,000,000. Channel occupies approximately 53,000 square feet of the shopping center for its retail outlet, and Channel Realty subleases the remaining square footage to three (3) subtenants.

On February 22, 1991, Channel and Channel Realty filed a motion for an extension of time in which to assume or reject the Leases (the "First Extension Motion") pursuant to § 365(d)(4) of the Bankruptcy Code ("§ 365(d)(4)"). The First Extension Motion requested an additional ninety days beyond the March 15, 1991 deadline prescribed by § 365(d)(4).

Legacy objected to the First Extension Motion. On March 15, 1991, the Bankruptcy Court held a hearing on the First Extension Motion. Legacy did not appear at the hearing on the First Extension Motion. At the hearing, the Bankruptcy Court orally granted the Respondents an extension of time to assume or reject the Leases, including the Brandywine Lease, through June 17, 1991 (the "First Extension"). A written order to this effect was entered on April 2, 1991, and an amended order was entered on April 11, 1991. Legacy did not appeal the granting of the First Extension.

On May 31, 1991, Channel and Channel Realty filed a motion (the "Second Extension Motion") requesting a further extension of time through January 17, 1992 in which to assume or reject the Leases, including the Brandywine Lease. The basis for the Second Extension Motion was the same as that for the First Extension Motion, to wit, flexibility in developing a plan of reorganization, fixing the locations at which Channel would continue to operate, and avoiding premature assumption of the Leases.

Legacy objected to the Second Extension Motion. The

Bankruptcy Court held a hearing on the Second Extension Motion on June 17, 1991. Because of the crowded calendar on that date, the Bankruptcy Court adjourned the hearing, with the consent of Legacy, until June 21, 1991.

At the June 21, 1991 hearing, instead of granting the long extension requested in the Second Extension Motion, the Bankruptcy Court "directed" Channel Realty to assume the Brandywine Lease on or before July 26, 1991 (the "Second Extension").[1] The Bankruptcy Court extended the time for Respondents to assume the Brandywine Lease so as to allow Respondents to file the motion to assume. Because of Legacy's continuing objections, Respondents filed a notice of contingent assumption of the Brandywine Lease effective June 17, 1991. The purpose of this notice of contingent assumption was to protect Respondents' interest in the Brandywine Lease in the event it was ever determined that an extension to assume the Brandywine Lease beyond June 21, 1991 was not permissible.[2] On July 1, 1991, prior to the entry of a written order, Legacy filed an appeal from the oral ruling of the Bankruptcy Court granting the Second Extension.

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1. With regard to the vast majority of the Leases, the Bankruptcy Court granted the Respondents an extension of time to assume or reject until January 17, 1992.

2. Respondents submit that irrespective of the propriety of the ruling of the Bankruptcy Court granting multiple extensions, they should not be penalized because they reasonably relied upon the Bankruptcy Court's conclusion that § 365(d)(4) permits multiple motions for extensions of time. If the Bankruptcy Court had denied the Respondents' Second Extension Motion, Respondents, as evidenced by the notice of contingent assumption, elected to assume the Brandywine Lease by June 17, 1991, and they would not have permitted a "deemed" rejection under § 365(d)(4). Respondents reliance upon the Bankruptcy Court's ruling under these circumstances precludes the forfeiture of their valuable rights in the Brandywine Lease. *In re Victoria Station, Inc.*, 875 F.2d 1380, 1385 (9th Cir. 1989) and cases cited therein.

On July 3, 1991, Channel Realty filed the motion to assume the Brandywine Lease (the "Assumption Motion"). The Bankruptcy Court held a hearing on the assumption motion on July 22, 1991. At this hearing, the Bankruptcy Court continued the matter until July 25, 1991 to enable Legacy to obtain docketed orders from the clerk's office establishing that its notice of appeal was properly filed. At the July 25, 1991 hearing, the Bankruptcy Court noted that no order had been docketed memorializing the Bankruptcy's Court's June 21, 1991 oral ruling granting the Respondents' Second Extension. As a result, the Bankruptcy Court concluded that Legacy's July 1, 1991 notice of appeal was a nullity.

At the July 25, 1991 hearing, the Bankruptcy Court ruled that the Second Extension was permissible because the Second Extension Motion was filed before the expiration of the First Extension. The Bankruptcy Court also ruled that Respondents had established cause for each of the extensions leading up to July 25, 1991 when it approved Respondents' assumption of the Brandywine Lease.

The Bankruptcy Court orally approved the assumption of the Brandywine Lease at the July 25, 1991 hearing and a written order (the "Assumption Order") was entered on July 30, 1991. Pursuant to the directives of the Assumption Order, Respondents cured their prepetition defaults under the Brandywine Lease by paying $13,950.83 representing the 1990 Consumer Price Index Adjustment, $167.74 in rent, and $17.56 in sewer taxes.

The District Court affirmed the decision of the Bankruptcy Court. The District Court held that § 365(d)(4) permits a Bankruptcy Court to grant a second extension of time more than sixty days after the entry of the order for relief so long as the first extension is granted within the initial sixty day period and there is cause for granting the extension.

The Third Circuit affirmed the decision of the District Court. The Third Circuit, consistent with the prior decisions of the Fifth and Ninth Circuits, held that multiple extensions of time to assume or reject leases are permissible under § 365(d)(4). The Third Circuit, like the District Court, found that there was sufficient evidence to support the Bankruptcy Court's finding that Respondents needed the extensions in order to make a decision regarding the Brandywine Lease as part of their plan. Accordingly, the Third Circuit found that the cause asserted for each extension was the same.

REASONS FOR DENYING THE WRIT

Respondents are amazed that Legacy represents to the Supreme Court of the United States that there is a split among the circuits. The decision of the Third Circuit in this case is not in conflict with the decisions of the Fifth and Ninth Circuits on the issue of whether multiple extensions of time to assume or reject leases are permissible under § 365(d)(4). All three courts of appeals have reached the same result on this issue. While it can be truthfully said that the reasoning of the courts of appeals is different, it cannot be truthfully said that the result is different.

Legacy maintains that the Third Circuit ignored the standards of interpretation prescribed by decisions of the Supreme Court of the United States in reaching its decision. The Third Circuit, consistent with a well established standard of statutory interpretation, began its analysis with an examination of the statutory language. The Third Circuit concluded that this was one of those rare cases in which the literal application of the statute would produce a result demonstrably at odds with the intention of its drafters. This conclusion not only is correct, but also is based upon a recognized principle of statutory interpretation established by prior decisions of this Court.

I.

THE DECISION OF THE THIRD CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF THE FIFTH AND NINTH CIRCUITS AS ALL THREE CIRCUITS HAVE HELD THAT THE FIRST EXTENSION MUST BE SOUGHT BEFORE THE EXPIRATION OF THE SIXTY DAY PERIOD FOLLOWING THE ENTRY OF THE ORDER FOR RELIEF AND FURTHER EXTENSIONS MUST BE SOUGHT BEFORE THE EXPIRATION OF THE EXTENDED PERIOD.

Legacy asserts that this matter presents "an intolerable conflict among the Circuits." (Petition, 8). Legacy, in an attempt to manufacture a split among the circuits where none exists, selectively quotes from a footnote in the opinion of the Third Circuit. (Petition, 5). Legacy quotes only a portion of n. 7 from the opinion of the Third Circuit as follows: "a necessary consequence of the Ninth Circuit's parsing of the statutory language is that a first extension request would not have to be filed within the 60 day period." (Petition, 5). This is seriously misleading because Legacy conveniently omits the phrase that follows the comma, which reads "*the Ninth Circuit's decisions do not expressly embrace this conclusion.*" (Emphasis supplied). (App. 14 n. 7).

The decisions of the Ninth Circuit in *Southwest Aircraft Services, Inc. v. The City of Long Beach* (*In re Southwest Aircraft Services, Inc.*), 831 F.2d 848 (9th Cir. 1987) and in *Willamette Waterfront, Ltd. v. Victoria Station, Inc.* (*In re Victoria Station, Inc.*), 875 F.2d 1380 (9th Cir. 1989) and of the Fifth Circuit in *Chapman Investment Associates v. American Healthcare Management* (*In re American Healthcare Management, Inc.*), 900 F.2d 827 (5th Cir. 1990) hold, as the Third Circuit held in this case, that the first request for an extension in which to assume or reject leases of nonresidential real property must be filed within the

initial sixty day period following the entry of the order for relief.[3] It is clear, therefore, that all three courts of appeals hold that the first motion for an extension must be filed within the initial sixty day period following the entry of the order for relief, and further, that Legacy's contention is meritless.

Legacy also asserts that the decision of the Third Circuit is in conflict with the decisions of the Fifth Circuit in *Chapman Investment Associates v. American Healthcare Management, supra,* and of the Ninth Circuit in *Willamette Waterfront Ltd. v. Victoria Station, Inc., supra,* as to the time within which the "cause" for an extension must arise. (Petition, 5). Specifically, Legacy claims that, under the decisions of the Fifth and Ninth Circuits, the only cause which will support an extension is a cause that first arises prior to the expiration of the initial sixty day period following the entry of the order for relief and continues. This, Legacy claims is in conflict with the Third Circuit's decision in this case in which, Legacy claims, that the Third Circuit held that a

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3. In *Southwest Aircraft Services v. City of Long Beach, supra,* the Ninth Circuit stated, "we recognize that while the legislative history does not specifically mention that the debtor must file its motion for an extension within 60 days, *such a requirement may be fairly implied in the section.*" (Emphasis supplied). 831 F.2d at 851. In *Willamette Waterfront Ltd. v. Victoria Station, Inc., supra,* the Ninth circuit stated, "*while section 365(d)(4) requires a debtor to move upon cause for an extension within the first sixty days,* Victoria Station did just that." (Emphasis supplied). 875 F.2d at 1385. In *Chapman Investment Associates v. the American Healthcare Management, supra,* the Fifth Circuit stated, "the Ninth Circuit recently held that, although section 365(d)(4) requires the lessee to assume or reject leases or file a motion to extend the time to assume or reject *within the initial sixty-day period,* . . . 900 F.2d at 829. The Fifth Circuit then concluded that "the interpretation of section 365(d)(4) adopted in *Victoria Station* . . . reflects an appropriate balance between the interest of lessors and bankrupt lessees and will be most likely to result in expeditious decisions of whether to assume or reject leases." 900 F.2d at 830. Legacy concedes, as it must, that the Third Circuit requires the first motion for an extension to be filed within the initial sixty day period. (Petition, 5). *See* App. 18.

second extension may be granted based on any cause no matter when it arises. (Petition, 5).

This contention likewise is meritless. First, the Fifth and Ninth Circuits do not hold, or even suggest, that the cause which supports the first extension must be the same cause which supports any further extension.[4] Legacy cannot, and does not, cite even one passage from the decisions of the Fifth Circuit and the Ninth Circuit to support its contention that their decisions hold that the cause to support the extension must first arise prior to the expiration of the initial sixty day period and continue. On the contrary, the decision of the Fifth Circuit in *Chapman Investment Associates v. American Healthcare Management, supra,* clearly and conclusively establishes that this is not true.

Moreover, the Third Circuit did not hold, as Legacy contends that it did, that any cause, no matter when it arises, will support an extension. Legacy's contention is based on its perception that the cause for the First Extension was different than the cause for the Second Extension. However, Legacy ignores the Bankruptcy

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4. Indeed, in *Chapman Investment Associates v. American Healthcare Management, supra,* the debtor, at the time of the filing of its petition, was the lessee of a number of parcels of nonresidential property. 900 F.2d at 829. The debtor requested, and was granted, two extensions of time in which to assume or reject its leases of nonresidential real property, presumably for the reason that the debtor required additional time to determine which of its leases it would assume or reject. *Id.* When the debtor requested a third extension of time, the bankruptcy court directed the debtor to immediately file a motion to assume or reject its leases of nonresidential real property. *Id.* After giving this direction, the bankruptcy court then entered an order extending the time during which *American* could assume or reject to the date of the hearing on *American's* motion to assume. Accordingly, the third extension in that case was granted for a cause different from the cause which supported the first two extensions, to wit, to enable the debtor to assume a valuable leasehold interest.

Court's findings of fact which were affirmed by both the District Court and the Third Circuit on this issue.[5] The Third Circuit stated "we have reviewed the pertinent portions of the record, and we find no clear error." (App. 20). The Third Circuit then held, "we find sufficient factual support for the finding that the debtors needed the extensions in order to make a decision regarding the *Brandywine* lease as part of their plan." *Id.* Thus, contrary to Legacy's contention, the Third Circuit found, as a matter of fact, that the cause for the First Extension and the cause for the Second Extension was the same; that it arose within the initial sixty day period following the entry of the order for relief; and that it continued.

Finally, Legacy's contention, that the decision of the Third Circuit conflicts with the decisions of the Fifth and Ninth Circuit on the ultimate issue of whether a Bankruptcy Court may grant multiple extensions of time to assume or reject leases of nonresidential real property under § 365(d)(4), likewise is meritless. All three courts of appeals have reached the same result on this issue. In *Willamette Waterfront Ltd. v. Victoria Station, Inc., supra,* the Ninth Circuit held, "while section 365(d)(4) requires a debtor to move upon cause for an extension within the first 60 days, Victoria Station did just that. Where cause arises within the first 60 days and the Bankruptcy Court enlarges the time for assumption or rejection beyond that period, section 365(d)(4) permits the court to grant further extensions if cause justifies delay." 875 F.2d at 1385. In *Chapman Investment Associates v. The American Healthcare Management, supra,* the Fifth Circuit held, "[A] bankruptcy court may grant multiple extensions of time in which a lessee must assume or reject its leases of nonresidential real property so long as

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5. The decisions of the Supreme Court of the United States establish that concurrent findings of lower courts on questions of fact are accepted by the Supreme Court of the United States. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

a motion to extend is brought prior to the expiration of the period as previously extended and there is 'cause' for granting the extension." 900 F.2d at 830. In this case, the Third Circuit held, "[W]e thus agree with the result reached by the two other courts of appeals and all but one of the other courts that have considered this question. Accordingly, we hold that Section 365(d)(4) did not bar the bankruptcy court from granting a second extension in this case." (App. 18, 19).

These holdings of the courts of appeals clearly and conclusively establish that there is no conflict among their decisions. All three courts of appeals hold that the first motion for an extension must be filed before the expiration of the sixty day period following the entry of the order for relief, and that additional extensions are permissible so long as the extension is sought prior to the expiration of the extended period, and the debtor establishes cause for granting each extension. Thus, lessors and debtor-lessees confronted with this issue in future cases are in no way subject to disparate results depending on the circuit in which the bankruptcy case is filed.

Respondents submit that it is manifest from a review of the conclusions in the three circuits that these decisions are in harmony, and not in conflict. There is, therefore, no reason for the Supreme Court of the United States to grant Legacy's Writ of Certiorari and add to the overcrowded docket of this Court.

II.

THE THIRD CIRCUIT DID NOT IGNORE ESTABLISHED STANDARDS OF STATUTORY INTERPRETATION IN REACHING ITS DECISION. ON THE CONTRARY, THE THIRD CIRCUIT FAITHFULLY FOLLOWED WELL RECOGNIZED STANDARDS OF STATUTORY INTERPRETATION.

Legacy asserts that the Third Circuit decided "[A]n Important Federal Question In A Way That Patently Violates The Standards Of Statutory Interpretation." (Petition, 6). Legacy quotes portions of the opinion of the Third Circuit out of context, and then makes the quantum leap to the conclusion that the Third Circuit failed "to comply with standards of interpretation prescribed by recent decisions of this Court, particularly with respect to statutes that are determined to be unambiguous." (Petition, 10). This is particularly distressing since Legacy omits from its petition any discussion of the facts of the case and the contentions of the parties that were before the Third Circuit when it decided the case.

Respondents' reorganization cases were extremely complex. As of the Filing Date, Channel and Channel Realty were either tenant or landlord to over 200 leases and/or subleases of non-residential real property at 91 separate locations in 19 different states. (App. 32). Respondents sought to consolidate their business operations into 52 of their most profitable locations as part of their reorganization. *Id.* Respondents' reorganizations were exceptional cases involving large numbers of Leases. The large number of Leases that had to be evaluated, as part of Respondents' reorganization effort, were the cause advanced by Respondents in support of each motion for an extension. (App. 51). The Third Circuit concurred in this finding. (App. 20).

The Third Circuit identified the issue before it stating, "The

primary question presented in this appeal concerns a bankruptcy court's authority to grant a second extension under Section 365(d)(4) more than 60 days after the order of relief." (App. 9). The Third Circuit then identified the contentions of the parties stating, "Legacy contends that Section 365(d)(4) prohibits a bankruptcy court from granting any extension once the 60-day period ends. By contrast, the debtors [Respondents] maintain that this provision permits a bankruptcy court to grant a second extension at that time." *Id.* The statements of the Third Circuit mentioned at page 6 of the Petition ((i) – (iii)) were made in reference to the issue as stated by the Third Circuit (App. 10-12).

What Legacy does not mention is that the Third Circuit "found guidance in the evident purpose of Section 365(d)(4)." (App. 12). The Third Circuit determined that the legislative history was silent on the specific issue of whether a Bankruptcy Court has authority to grant a second extension. However, the Third Circuit found that the legislative history supported the conclusion that § 365(d)(4) was intended to prevent undue delay, and further, that the cases construing this provision recognized that this is the provision's purpose. (App. 12-13).

The Third Circuit, with all of the facts and the competing contentions of the parties before it, and with a clear understanding of the purpose of § 365(d)(4), undertook to interpret the statute. The Third Circuit's objective was to interpret the statute to ascertain the intent of Congress and to give effect to its legislative will. *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975). The Third Circuit began its analysis with the language of the statute. (App. 13). Clearly, this complies with the standards of interpretation established by the decisions of the Supreme Court of the United States. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

While the Third Circuit reached the same result as was

reached by the Ninth Circuit in *Willamette Waterfront, Ltd. v. Victoria Station, Inc., supra,* the Third Circuit declined to adopt the Ninth Circuit's interpretation that the language of the statute was ambiguous. (App. 14-15). The Third Circuit then examined Legacy's alternative interpretation which is that a lease must be assumed or rejected within 60 days after the date of the order for relief, or within any additional period of time that the bankruptcy court fixes during the initial 60 day period. (App. 15-16). While the Third Circuit acknowledged, "that a strictly literal parsing of the words of the statute leads to these results," the Third Circuit nevertheless concluded, "but we do not believe that we are bound to accept such an interpretation in this case." (App. 16). The Third Circuit gave two reasons for its conclusion. First, the Third Circuit stated, "[w]e cannot say that the statutory language unambiguously evidences a congressional intent in effect to prohibit second extensions." (App. 16).

Second, the Third Circuit determined that even unambiguous statutory language need not be followed in those rare cases in which the literal application of the statute produces a result demonstrably at odds with the intention of its drafters. (App. 16). The Third Circuit cited and relied upon the decisions of the Supreme Court of the United States in *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982); *Public Citizen v. United States Department of Justice,* 491 U.S. 440, 454 (1989); *Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 509-10 (1989); *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989). The Third Circuit concluded correctly that, "this is one of those rare cases." (App. 16).

The Third Circuit persuasively demonstrated, as the Fifth Circuit had done in *Chapman Investment Associates v. American Health Care Management, supra,* that Legacy's literal interpretation of § 365(d)(4) was "demonstrably at odds with the intention of its drafters" because such construction, rather than

fulfilling the evident purpose of the statute, which is to prevent undue delay, would actually *promote* the very delay which Congress sought to prevent. (App. 17-18).

The statement of the Third Circuit identified as (iv) on page 6 of the petition was not made until after the Third Circuit had completed its analysis of the statutory language and legislative history. The Third Circuit did not, as Legacy maintains, interpret the statute without reference to the language of the statute and to its legislative history. The Third Circuit found that the plain language of the statute did not unambiguously evidence a congressional intent to prohibit second extensions. The Third Circuit found that the legislative history established that the purpose of § 365(d)(4) was to prevent undue delay, and arrived at a construction of § 365(d)(4) which is consistent with and gives effect to its purpose. Simply stated, the standards of interpretation used by the Third Circuit were, in no way, contrary to the decisions of the Supreme Court of the United States.

CONCLUSION

Legacy's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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